

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOEL WHITE,

Plaintiff,

1

STEPHEN SINCLAIR, et al.,

Defendants.

CASE NO. 3:20-CV-5141-RSM-DWC

REPORT AND RECOMMENDATION

Noting Date: January 8, 2021

The District Court has referred this action, filed pursuant to 42 U.S.C. § 1983, to United States Magistrate Judge David W. Christel. Plaintiff Joel White, proceeding *pro se* and *in forma pauperis*, initiated this civil rights action on February 18, 2020.¹ Dkt. 7. Presently pending before the Court is Defendants' Motion for Summary Judgment ("Motion," Dkt. 30) and Plaintiff's Motion to Amend the Second Amended Complaint ("Motion to Amend," Dkt. 34).

¹ Plaintiff was ordered to file a second amended complaint after his Complaint and Amended Complaint were screened pursuant to 28 U.S.C. § 1915. *See* Dkt. 9, 16, 18. Plaintiff filed the Second Amended Complaint on July 9, 2020 and the Court ordered service of the Second Amended Complaint on August 11, 2020. Dkt. 18, 19.

1 The Court concludes Plaintiff has failed to state claims of retaliation, equal protection
 2 violations, or due process violations. Accordingly, the Court recommends the Motion be granted
 3 and the Motion to Amend be denied.

4 **I. Background**

5 In the Second Amended Complaint, Plaintiff alleges his Fourteenth Amendment equal
 6 protection rights are being violated because he is being paid differently from prisoners at other
 7 corrections facilities in Washington State. Dkt. 18. He also states Defendants failed to comply
 8 with Washington State Department of Corrections (“DOC”) policies related to prison work
 9 classifications. *Id.* He states Defendant’s failure to follow and implement DOC policies violates
 10 his Fourteenth Amendment due process rights. *Id.* Lastly, Plaintiff alleges he was retaliated
 11 against for filing a grievance related to his wages. *Id.*

12 Defendants filed the Motion on October 9, 2020. Dkt. 30. In support of the Motion,
 13 Defendants submitted the declaration of Michelle Caldwell and copies of DOC policies and work
 14 program documents. Dkt. 31. Plaintiff filed a Response. Dkt. 33. In addition, Plaintiff’s Second
 15 Amended Complaint was signed under penalty of perjury and is being considered as evidence.²
 16 See Dkt. 18. Defendants filed a Reply. Dkt. 35. Along with the Reply, Defendants also filed a
 17 Declaration of Counsel and a copy of DOC Policy 710.400, Correctional Industries Work
 18 Programs. Dkt. 36, Exhibit 1.

19 On October 27, 2020, Plaintiff filed the Motion to Amend. Dkt. 34. Plaintiff seeks to
 20 amend his Second Amended Complaint to increase the amount of punitive damages requested
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 23 ² Because Plaintiff is *pro se*, the Court “must consider as evidence in his opposition to summary judgment all of
 24 [Plaintiff’s] contentions offered in motions and pleadings, where such contentions are based on personal knowledge
 and set forth facts that would be admissible in evidence, and where [Plaintiff] attested under penalty of perjury that
 the contents of the motions or pleadings are true and correct.” *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004).

1 from \$1,500 to \$8,500. Dkt. 34. Plaintiff did not provide a copy of the proposed third amended
 2 complaint as required by Local Rule 15. *See* Dkt. 34. Defendants filed a Response. Dkt. 35.

3 **II. Standard of Review**

4 Pursuant to Rule 56 of the Federal Rules of Civil Procedure, “the court shall grant
 5 summary judgment if the movant shows that there is no genuine dispute as to any material fact
 6 and the movant is entitled to judgment as a matter of law.” A party asserting a fact cannot be or
 7 is genuinely disputed must support the assertion by:

- 8 (A) citing to particular parts of materials in the record, including depositions,
 documents, electronically stored information, affidavits or declarations,
 stipulations (including those made for purposes of the motion only), admissions,
 interrogatory answers, or other materials; or
- 10 (B) showing that the materials cited do not establish the absence or presence of a
 genuine dispute, or that an adverse party cannot produce admissible evidence to
 support the fact.

12 Fed. R. Civ. P. 56(c)(1). All facts and reasonable inferences drawn therefrom must be viewed in
 13 the light most favorable to the nonmoving party. *Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th
 14 Cir. 2013) (*citing Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011); *Tarin v.*
 15 *County of Los Angeles*, 123 F.3d 1259, 1263 (9th Cir. 1997).

16 As the party moving for summary judgment, Defendants have the initial burden to
 17 demonstrate no genuine issue of material fact remains in this case. *Celotex Corp. v. Catrett*, 477
 18 U.S. 317, 325 (1986); *In re Oracle Corp. Securities Litigation*, 627 F.3d 376, 387 (9th Cir.
 19 2010). The movant “always bears the initial responsibility of informing the district court of the
 20 basis for its motion,” and identifying those portions of the record, including pleadings, discovery
 21 materials, and affidavits, “which it believes demonstrate the absence of a genuine issue of
 22 material fact.” *Celotex*, 477 U.S. at 323. Mere disagreement or the bald assertion stating a
 23 genuine issue of material fact exists does not preclude summary judgment. *California*
 24 *Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th

1 Cir. 1987). A “material” fact is one which is “relevant to an element of a claim or defense and
 2 whose existence might affect the outcome of the suit,” and the materiality of which is
 3 “determined by the substantive law governing the claim.” *T.W. Electrical Serv., Inc. v. Pacific*
 4 *Electrical Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

5 Mere “[d]isputes over irrelevant or unnecessary facts,” therefore, “will not preclude a
 6 grant of summary judgment.” *Id.* Rather, the nonmoving party “must produce at least some
 7 ‘significant probative evidence tending to support the complaint.’” *Id.* (*quoting Anderson*, 477
 8 U.S. at 290); *see also California Architectural Building Products, Inc.*, 818 F.2d at 1468 (“No
 9 longer can it be argued that any disagreement about a material issue of fact precludes the use of
 10 summary judgment.”). In other words, the purpose of summary judgment “is not to replace
 11 conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.”
 12 *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990). “If a party fails to properly
 13 support an assertion of fact or fails to properly address another party’s assertion of fact as
 14 required by Rule 56(c), the court may . . . grant summary judgment if the motion and supporting
 15 materials—including the facts considered undisputed—show that the movant is entitled to it[.]”
 16 Fed R. Civ. P. 56(e)(3).

17 **III. Discussion**

18 In the Motion, Defendants contend Plaintiff failed to demonstrate (1) a Fourteenth
 19 Amendment due process violation and (2) a First Amendment violation. Dkt. 32. The Court
 20 agrees with Defendants and also finds Plaintiff has (3) failed to allege a Fourteenth Amendment
 21 equal protection violation.

22 In order to state a claim for relief under 42 U.S.C. § 1983, a plaintiff must show: (1) he
 23 suffered a violation of rights protected by the Constitution or created by federal statute, and (2)
 24 the violation was proximately caused by a person acting under color of state law. *See Crumpton*

1 1 *v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). The first step in a § 1983 claim is therefore to
 2 identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271
 3 (1994).

4 To satisfy the second prong, a plaintiff must allege facts showing how individually
 5 named defendants caused, or personally participated in causing, the harm alleged in the
 6 complaint. *See Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988); *Arnold v. IBM*, 637 F.2d 1350,
 7 1355 (9th Cir. 1981). A person subjects another to a deprivation of a constitutional right when
 8 committing an affirmative act, participating in another's affirmative act, or omitting to perform an
 9 act which is legally required. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). Sweeping
 10 conclusory allegations against an official are insufficient to state a claim for relief. *Leer*, 844 F.2d
 11 at 633. Further, a § 1983 suit cannot be based on vicarious liability alone but must allege the
 12 defendant's own conduct violated the plaintiff's civil rights. *City of Canton v. Harris*, 489 U.S.
 13 378, 385-90 (1989).

14 A. *Due Process*

15 1. Property Interest

16 In the Second Amended Complaint, Plaintiff alleges his due process rights³ were violated
 17 when Defendants declined to treat his inmate kitchen worker job as a Class II job and instead
 18 decided to treat it as a Class III job.⁴ Dkt. 18.

19 Pursuant to the Due Process Clause of the Fourteenth Amendment, "no state shall
 20 'deprive any person of life, liberty, or property without due process of law.'" *Toussaint v.*
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 23 ³ Plaintiff also alleges a violation of his due process rights under the Fifth Amendment. Dkt. 18. However, the Fifth
 24 amendment only applies to the federal government. *Bingue v. Prunchak*, 512 F.3d 1169, 1174 (9th Cir. 2008).

⁴ It is undisputed Class III program prison workers are limited to receiving \$55 per month for their gratuity. Dkt. 31.
 Declaration of Michelle Cardwell (Cardwell Declaration), Exhibit 1 at 3.

1 *McCarthy*, 801 F.3d 1080, 1089 (9th Cir. 1986), *overruled on other grounds*, *Sandin v Conner*,
 2 515 U.S. 472 (1995). The due process guarantees of the Fourteenth Amendment thus “apply only
 3 when a constitutionally protected liberty or property interest is at stake.” *Tellis v. Godinez*, 5
 4 F.3d 1314, 1316 (9th Cir. 1993).

5 The ultimate inquiry is whether the confinement imposes an atypical and significant
 6 hardship. *See Sandin*, 515 U.S. at 483-84; *Serrano v. Francis*, 345 F.3d 1071, 1079 (9th Cir.
 7 2003). Determining whether a prison condition is “atypical and significant” requires
 8 consideration of the specific facts of each case. *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir.
 9 1996). Courts consider three guideposts in framing the inquiry: (1) whether the challenged
 10 condition mirrored those conditions imposed upon inmates in administrative segregation and
 11 protective custody, and thus comported with the prison’s discretionary authority; (2) the duration
 12 of the condition and the degree of restraint imposed; and (3) whether the state’s action will
 13 invariably affect the duration of the prisoner’s sentence. *Serrano*, 345 F.3d at 1078.

14 However, prisoners have no constitutional right to be paid for work during incarceration.
 15 *Hale v. Arizona*, 993 F.2d 1387, 1394 (9th Cir.), *cert. denied*, 114 S.Ct. 386 (1993) (prisoners are
 16 not “employees” entitled to minimum wage under the Fair Labor Standards Act); *Cornish v.*
 17 *Lewis*, 51 F.3d 279 (9th Cir. 1995) (money earned by prisoners convicted of driving while
 18 intoxicated or under the influence paid into an alcohol abuse program did not deprive prisoners
 19 of due process). Nor does Plaintiff have constitutionally protected interest in a prison
 20 employment. *Toussaint v. McCarthy*, 801 F.2d 1080, 1094–95 (9th Cir. 1986) (no
 21 constitutionally protected liberty or property interest in a job); *Walker v. Gomez*, 370 F.3d 969,
 22 973 (9th Cir. 2004) (concluding that the Constitution does not create a property or liberty interest
 23 in prison employment); *Peralta v. Martel*, 2009 WL 700418, at *3 (E.D. Cal. Mar. 16, 2009)
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1 (prisoner failed to state a cause of action under § 1983 for violation of his due process rights
 2 when he could not obtain a prison job that would entitle him to more yard access, recreation, and
 3 entertainment activities).

4 Further, there is no recognized property interest in prison wages created under
 5 Washington State law. *See, e.g., In re Metcalf*, 92 Wn. App. 165 (Wash. Ct. App. 1998) (no
 6 property interest in prison wages); *see also National Elec Contractors Ass'n, Cascade Chapter v.*
 7 *Riveland*, 138 Wn.2d 9, 30-31, 978 P.2d 481 (1999) (recognizing Washington State law provides
 8 DOC the authority to adopt a gratuity scale). Rather, Washington state law leaves prisoner
 9 compensation to the discretion of the Washington DOC. *See* WAC 137-88-033(3). (Each prison
 10 facility is afforded discretion to determine its own Class III programs.); RCW 72.09.100(2)(f)
 11 (Class II); RCW 72.09.100(3)(e) (Class III).

12 Moreover, Plaintiff has not alleged an “atypical and significant hardship … in relation to
 13 the ordinary incidents of prison life.” *Sandin*, 515 U.S. 472 at 484. Plaintiff’s claims regarding
 14 his prison employment wages do not rise to this level. *See, e.g. Frazier v. Coughlin*, 81 F.3d
 15 313, 317 (2d Cir. 1996) (loss of commissary, recreation, package, and telephone privileges did
 16 not amount to an atypical and significant deprivation). *Peralta v. Martel*, 2009 WL 700418, at *4
 17 (E.D. Cal. Mar. 16, 2009) (quoting *Sandin*, 515 U.S. at 483–84) (denial of rehabilitation,
 18 training, education, or employment is not an appreciable restraint as compared to the ordinary
 19 incidents of prison life). *See also Barbo v. Ryan*, 399 F. Appx. 272, 273 (9th Cir. 2010) (loss of
 20 prison job due to classification change does not violate Eighth Amendment).

1 Accordingly, Plaintiff has failed to state a claim upon which relief can be granted. The
 2 Court recommends that Defendants' Motion for Summary Judgment be granted on this claim.⁵

3 2. Failure to Follow DOC Policy

4 Plaintiff also alleges Defendants violated his Fourteenth Amendment due process rights
 5 when they failed to follow a DOC policy regarding inmate worker classifications at SCCC. Dkt.
 6 18. Plaintiff contends Defendants' failure to follow DOC policy has resulted in Plaintiff being
 7 paid less than other inmates performing the same job at different DOC facilities. *See id.* at pp. 8-
 8 16. The alleged failure to follow a prison policy does not establish a federal constitutional
 9 violation. *See Cousins v. Lockyer*, 568 F.3d 1063, 1070 (9th Cir. 2009); *Manzanillo v. Jacquez*,
 10 555 F. App'x. 651, 653 (9th Cir. 2014) (allegations that a defendant violated prison policy "does
 11 not constitute a violation of a federal right"). As allegations that Defendants violated DOC policy
 12 does not constitute a violation of a federal right, Plaintiff's claim that Defendants violated his
 13 Fourteenth Amendment due process rights when they failed to implement and follow DOC
 14 policies fails to state a claim upon which relief can be granted. As such, the Court recommends
 15 that Defendants' Motion for Summary Judgment be granted on this claim.

16 B. *Equal Protection*

17 In the Second Amended Complaint, Plaintiff, who is housed at SCCC, states he is paid less
 18 than other inmates who are performing the same job at different DOC facilities. Dkt. 18 at 13-16.
 19 While Plaintiff appears to categorize this claim as a violation of due process, the language used
 20 throughout the Second Amended Complaint appears to implicate a violation of his equal protection
 21 rights. *See id.* at 17 (For example, Plaintiff alleges he was "treated differently than similarly-

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23 ⁵ Because the Court finds Plaintiff does not have a property or liberty interest in his prison wages, the Court declines
 24 to consider Defendants' argument Plaintiff waived his due process rights when he signed an agreement he would be
 paid at the Class III level. *See Dkt. 30* at 6-7.

1 situated individuals.”). Therefore, although Defendants do not seek dismissal of a claim for
 2 violation of equal protection rights in their Motion,⁶ the Court will review Plaintiff’s allegations as
 3 they pertain to the Equal Protection Clause.⁷

4 The Fourteenth Amendment’s Equal Protection Clause “is essentially a direction that all
 5 persons similarly situated should be treated alike.” *City of Cleburne, Tex. v. Cleburne Living*
 6 *Center*, 473 U.S. 432, 439 (1985). To bring a successful equal protection claim, a plaintiff must
 7 show differential treatment from a similarly situated class. *See Washington v. Davis*, 426 U.S.
 8 229, 239 (1976). For this differential treatment to give rise to a claim under 42 U.S.C. § 1983,
 9 “one must show intentional or purposeful discrimination.” *Draper v. Rhay*, 315 F.2d 193, 198
 10 (9th Cir. 1963) (inmate failed to show § 1983 violation in absence of “intentional or purposeful
 11 discrimination”).

12 Plaintiff contends his equal protection rights are being violated because he is being paid
 13 less to work in the kitchen at SCCC than other inmates are being paid to work in kitchens in
 14 different DOC facilities. Dkt. 18 at 13-17. Prisoners housed in different institutions are not
 15 similarly situated. *Walker v. Woodford*, 454 F. Supp. 2d 1007, 1019 (S.D. Cal. 2006). As the
 16 Court noted in its prior screening order, Plaintiff alleges he is being treated differently than
 17 inmates housed in different facilities, Plaintiff has not alleged he is being treated differently than
 18 similarly-situated individuals. *See* Dkt. 16 at 4; 18 at 13-17. Therefore, Plaintiff’s claim that

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⁶ Defendants address Plaintiff’s equal protection claim in their Reply, arguing the Court has already dismissed Plaintiff’s equal protection claims and the operative claim does not contain such a claim as a result. Dkt. 35 at 4-5. However, Defendants did not seek dismissal of an equal protection claim in their Motion based on the Second Amended Complaint. Dkt. 18; 35 at 4-5. Defendants may not raise a new issue in a Reply. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1289 n.4 (9th Cir. 2000)

⁷ Although Defendants did not raise this claim as a basis for summary judgment, all or part of a complaint filed by a prisoner may be dismissed *sua sponte* if the prisoner’s claims lack an arguable basis in law or in fact. *See Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

1 Defendants' violated his Equal Protection rights fails to state a claim upon which relief can be
 2 granted. The Court recommends this claim be dismissed.⁸

3 *C. First Amendment Retaliation*

4 Plaintiff alleges he was retaliated against because after he filed a grievance, he still did
 5 not receive Class II compensation. Dkt. 18.

6 To prevail on a retaliation claim, a plaintiff must allege and prove the defendant retaliated
 7 against him for exercising a constitutional right and the retaliatory action did not advance
 8 legitimate penological goals or was not narrowly tailored to achieve such goals. *Hines v. Gomez*,
 9 108 F.3d 265, 267 (9th Cir. 1997). A prisoner suing a prison official under § 1983 for retaliation
 10 for engaging in protected speech must allege "the type of activity he engaged in was protected
 11 under the first amendment and that the state impermissibly infringed on his right to engage in the
 12 protected activity." *Rizzo v. Dawson*, 778 F.2d 527 (9th Cir. 1983).

13 Within the prison context, a viable claim of First Amendment retaliation entails five
 14 basic elements: (1) An assertion that a state actor took some adverse action against
 15 an inmate (2) because of (3) that prisoner's protected conduct, and that such action
 16 (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did
 17 not reasonably advance a legitimate correctional goal.

18 *Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir. 2005). "Mere speculation that defendants
 19 acted out of retaliation is not sufficient." *Wood v. Yordy*, 753 F.3d 899, 905 (9th Cir. 2014).

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 21 Here, Plaintiff has failed to set forth any evidence demonstrating his grievance had any
 22 impact on his ability to receive specific compensation for his prison job. Rather, he allegations in
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25 ⁸ As discussed in more detail below, the Court finds it is clear from the Second Amended Complaint that Plaintiff
 26 cannot overcome the deficiencies by an additional amendment. *See Swearington v. California Dep't of Corr. &*
27 Rehab., 624 F. App'x 956, 959 (9th Cir. 2015) (finding the district court did not abuse its discretion in dismissing
 28 without leave to amend because the plaintiff did not cure the complaint's deficiencies despite the district court's
 29 specific instructions about how to do so). "[D]istrict courts are only required to grant leave to amend if a complaint
 30 can possibly be saved"; leave amend is not required "if a complaint lacks merit entirely." *Lopez v. Smith*, 203 F.3d
 31 1122, 1129 (9th Cir. 2000).

1 the Second Amended Complaint demonstrate Plaintiff was denied Class II compensation *before*
 2 he filed his grievance. Dkt. 18 at 18 (copy of grievance). After he filed his grievance, Plaintiff
 3 was still not permitted to have Class II compensation. *See id.* As such, there is no evidence
 4 Plaintiff's protected conduct, the filing of a grievance, was a substantially motivating factor in
 5 the decision to afford him Class II compensation. Therefore, Plaintiff's retaliation claims fail as a
 6 matter of law. As such, the Court recommends that Defendants' Motion for Summary Judgment
 7 be granted on Plaintiff's retaliation claims.

8 **IV. Motion to Amend**

9 After Defendants' Motion was filed, Plaintiff filed a Motion to Amend seeking to
 10 increase the amount of putative damages sought. Dkt. 34. Defendants filed a response requesting
 11 the Motion to Amend be denied because Plaintiff did not attach the proposed amended complaint
 12 to the amendment would be futile. Dkt. 35.

13 Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure,

14 (1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter
 15 of course within:

- 15 (A) 21 days after serving it, or
- 16 (B) if the pleading is one to which a responsive pleading is required, 21 days after
 17 service of a responsive pleading or 21 days after service of a motion under Rule
 12(b), (e), or (f), whichever is earlier.

18 (2) ***Other Amendments.*** In all other cases, a party may amend its pleading only with
 19 the opposing party's written consent or the court's leave. The court should freely
 20 give leave when justice so requires.

21 Plaintiff has been allowed to amend his Complaint and Amended Complaint and the
 22 Court instructed Plaintiff regarding the deficiencies of both his Complaint and Amended
 23 Complaint. *See* Dkt. 5, 9, 13, 16, 18. Thus, Plaintiff cannot amend pursuant to Rule 15(a)(1).
 24 Further, Defendants have not provided written consent allowing Plaintiff to amend. *See* Dkt. 35.

1 Therefore, to amend the Second Amended Complaint, Plaintiff must have the Court's leave.

2 *See Fed. R. Civ. P. 15(a)(2).*

3 "Rule 15(a) is very liberal and leave to amend 'shall be freely given when justice so
 4 requires.'" *AmerisourceBergen Corp. v. Dialysis West, Inc.*, 445 F.3d 1132, 1136 (9th Cir. 2006)
 5 (quoting Fed. R. Civ. P. 15(a)). In determining whether leave to amend is appropriate, the district
 6 court considers 'the presence of any of four factors: bad faith, undue delay, prejudice to the
 7 opposing party, and/or futility.'" *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708,
 8 712 (9th Cir. 2001) (quoting *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999)).

9 Under Local Civil Rule 15, "[a] party who moves for leave to amend a pleading, or who
 10 seeks to amend a pleading by stipulation and order, must attach a copy of the proposed amended
 11 pleading as an exhibit to the motion or stipulation." Here, Plaintiff did not attach the proposed
 12 amended complaint. *See* Dkt. 34.

13 In addition, as discussed above, Plaintiff's claims fail as a matter of law. The Court finds it
 14 is clear from the Second Amended Complaint the deficiencies cannot be cured by an additional
 15 amendment. The amount of damages articulated in the Motion to Amend does not overcome the
 16 deficiencies of his Second Amended Complaint and there are no remaining claims in this case.

17 Therefore, allowing Plaintiff another opportunity to amend the complaint would be futile.

18 Because the Court recommends resolving every claim at issue in this case, it would be
 19 inappropriate to permit amendment at this juncture. *See, e.g., Nguyen v. United States*, 792 F.2d
 20 1500, 1503 (9th Cir.1986) ("A court will ordinarily be reluctant to allow leave to amend to a
 21 party against whom summary judgment has been entered.") (citing C. Wright, A. Miller, & M.
 22 Kane, *Federal Practice & Procedure* § 2712 (2d ed.1983)); *Schlacter-Jones v. Gen. Tel. of Cal.*,
 23 936 F.2d 435, 443 (9th Cir. 1991), *abrogated on other grounds by Cramer v. Consol.*

1 *Freightways, Inc.*, 255 F.3d 683 (9th Cir.2001) (“A motion for leave to amend is not a vehicle to
2 circumvent summary judgment.”).

3 Accordingly, the Court recommends Plaintiff not be given additional leave to amend and
4 the Motion to Amend be denied. *See Soghomonian v. United States*, 82 F.Supp.2d 1134, 1141
5 (E.D. Cal. 1999) (finding the court can deny a motion to amend on the basis of futility if the
6 amended complaint would be dismissed); *see also Fid. Fin. Corp. v. Fed. Home Loan Bank of*
7 *San Francisco*, 792 F.2d 1432, 1438 (9th Cir. 1986) (“The district court’s discretion to deny
8 leave to amend is particularly broad where the court has already given the plaintiff an
9 opportunity to amend his complaint.”).

V. Conclusion

11 For the above stated reasons, the Court concludes Plaintiff has failed to state claims of
12 retaliation, equal protection violations, or due process violations. Accordingly, the Court
13 recommends the Motion be granted and the Motion to Amend be denied and this case be closed.

14 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
15 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.
16 6. Failure to file objections will result in a waiver of those objections for purposes of *de novo*
17 review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit
18 imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on
19 January 8, 2021 as noted in the caption.

20 Dated this 10th day of December, 2020.



David W. Christel
United States Magistrate Judge